The Elephant in the Room

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The ECtHR's Grand Chamber judgement *N.D. and N.T. v. Spain* may be perceived as a referral of two migrants from illegal to legal pathways of entry, two migrants who were not in need of protection. Those celebrating the judgement for this outcome miss its unsettling implications for the effective guarantee of the principle of non-refoulement.

There has been a basic legal consensus (e.g. *M.S.S.*, *Hirsi*, *Sharifi*, *Gnandi*) that states, in order to comply with their duty not to bring deportation candidates into an inhuman or degrading situation, must give the opportunity to apply for protection and must assess an alleged risk before deportation. Art. 3 of the Convention is an absolute right and has to be guaranteed, as the Court stresses (para 171), in a practically effective manner. As per Art. 13 of the Convention an (at least preliminary) legal protection mechanism must be available and, if requested, be completed before removal. Otherwise protection may come too late, or rather will fail all together, because those removed are usually unable to actuate a complaint from abroad, especially when trapped in an inhuman situation. In short: Under returns without the above provisos ("hot returns") Art. 3 of the Convention is not guaranteed in a practically effective manner.

That said, how can the Court possibly take the view that, in circumstances such as in *N.D. and N.T.*, states are free under the Convention to engage in hot returns? It was meanwhile assessed for both of the applicants that they were not in need of protection and thus had not been violated in Art. 3, 13 of the Convention. The remaining question was whether the Spanish line of action – a line of action taken at a time when the risk of refoulement was unassessed – was compatible with Art. 4 of Protocol No. 4, the prohibition of collective expulsion. This provision aims, as the Court notes (para 198), at securing that states do not violate the principle of non-refoulement. Other than Art. 3, 13 of the Convention, which is violated only when deported persons are in need of protection, the prohibition of collective expulsion can be violated independently of whether the person concerned is in need of protection or not.

The ECtHR holds in *N.D. and N.T.* that the hot returns did not constitute collective expulsions, because the applicants had climbed over the border fence instead of seeking access at a legal entry point, such as the international border crossing point *Beni Anzar*, and thus may be held responsible themselves for the line of action of the Spanish authorities (paras 201, 206 ff).

Apart from the question of how this interpretation of Art. 4 of Protocol No. 4 can be reconciled with its wording – the Court develops its reasoning under the term "collective" (paras 192 ff) it is irritating from the point of view of the protective function for the principle of non-refoulement that the pathway of entry and an eventual misconduct in choosing it should play any role at all for the admissibility of

hot returns. Such circumstances do not alter the fact that hot returns are associated with refoulements if individuals in need of protection are among the deported, which is not excluded under hot returns. It is difficult to assume that the Court, by introducing a protection worthiness test for the purpose of more effective border protection, wanted to drop the concept of Art. 3 ECHR as an absolute guarantee, in a judgement on Art. 4 of Protocol No. 4. When a genocide perpetrator must not be deported into an inhumane or degrading situation, how could it be acceptable for irregular migrants who failed to seek legal access?

Furthermore, according to the Court (paras 218 ff), the legal entry point does not even need to be accessible for the person concerned (elsewise an individual examination seems necessary in order to be able to exempt the “innocent” individuals from the hot return). The Court argues that Spain cannot be held responsible under the Convention if Moroccan forces obstruct access to the border crossing point, Spain is not obliged to ensure that persons make it to the border crossing point. Indeed, *from the Convention* one cannot derive Spanish responsibility for third-country exit prevention, and it is true that Spain does not have to secure access to the border. But was that the question? The question was whether Spain could be held responsible under the Convention and Protocols *for its own, coercive, hot* deportation behavior. If this is no longer to be the case just because Spain has a door available somewhere in the border fence (not even an accessible one), then what is left of the protective function of the prohibition of collective expulsion for the principle of non-refoulement?

And what is left of the principle of non-refoulement itself (and of refugee protection) if persons who, due to a lack of accessible legal options to apply for protection, irregularly seek and find access may be subject to hot returns? The Court reiterates that states, when securing their borders, must not evade their responsibility to effectively guarantee the principle of non-refoulement (paras 167 ff, 181 ff, 232). Individuals who, unlike the applicants in the present case, are in need of protection must therefore still not be deported, that would be a violation of the principle of non-refoulement. The question is: Just how shall states ensure that from now on? How can one engage in hot returns *and* effectively guarantee Art. 3 ECHR? This is the elephant in the room to which the judgment, despite the relevance of the question for the interpretation of the prohibition of collective expulsion, remains silent – and which makes it a misjudgment.

The role of ensuring human rights in European asylum and border protection policy – a role that the ECtHR had previously performed more reliably than the CJEU – falls to the national courts and the CJEU at this point. Even if the CJEU should join the ECtHR when interpreting Art. 19 (1) of the Charter of Fundamental Rights of the European Union (CFR): It cannot leave unobjected hot returns, not even when the persons concerned were not in need of protection. Under Art. 47 CFR, unlike Art. 13 ECHR, it is sufficient that secondary law is violated, and secondary law stipulates the procedural requirements mentioned above in order to secure the principle of non-refoulement (e.g. Art. 6 ff, 43, 46 Asylum Procedures Directive, Art. 9, 12 f Return Directive, Art. 5, 26 f Dublin III Regulation). Of course these provisions also apply to persons not in need of protection, because that is exactly what needs to be checked

first, also for deportations to third countries. The Return Directive only applies if, despite an opportunity, no asylum application has been made (or it has been examined and rejected). At the external borders, instead of the Return Directive, national law may be applied (Art. 2 (2) a Return Directive). However, the principle of non-refoulement still must be complied with, which national law must effectively guarantee by appropriate procedural provisions. The legal protection guarantees of the national constitutions (in any case Art. 24 (1) of the Spanish Constitution), like Art. 47 CFR and unlike Art. 13 ECHR, do not require a violation of the principle of non-refoulement, a violation of the procedural provisions is sufficient.

After all, there is a chance that the former basic consensus – the principle of non-refoulement as an absolute guarantee with the consequence that people must not be deported without a substantial examination of an eventual risk – will be restored to the previous, plain state.

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